In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 530

BLUE MOUNTAIN CONSTRUCTION COMPANY, a corporation,

Petitioner,

v

H. C. WERNER and TAUF CHARNESKI,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Argument	

TABLE OF CASES

Adney v. Mississippi Lime Company, 241 F.2d 43	8
Collins v. Wayland, et al, 139 F.2d 677	6
Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212	7
Grivas v. Parmalee Transportation Co., 207 F.2d 334, cert. denied 347 U.S. 913, 74 S. Ct. 477, 97 L. Ed. 1069	8
Hubbard v. The B. & O. R. R. Co., 249 F.2d 885	7
Mooney v. Central Motor Lines, Inc., 222 F.2d 569	7
Ockert v. Union Barge Line Corp., 190 F.2d 303	8
Wisdom v. Texas Co., 27 F. Supp. 992	7

STATUTE

Rule 41, Federal Rules of Civil Procedure	3, 6, 8

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 49) is reported at 270 F.2d 305. The order of the district court dismissing the action with prejudice appears in the record on page 23 and in the petition for this writ on page 25, appendix B.

JURISDICTION

The judgment of the court of appeals was entered August 19, 1959 (R. 58). A petition for rehearing was denied September 21, 1959 (R. 59). The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

1. Whether district court exercised its discretion properly in dismissing action with prejudice, pursuant to Rule 41(b), Rules of Civil Procedure, and the local rules of court, where petitioner wilfully declined to appear for pre-trial conferences.

2. Whether petitioner has standing to challenge discretionary authority of court in dismissing action with prejudice, where petitioner declared it would not, in any event, proceed with the case after its motion for a voluntary dismissal had been denied.

3. Where petitioner had been duly notified to appear for pre-trial conference, set for a day certain, but its counsel contumaciously declined to appear, was the court, in the exercise of its judicial discretion, pursuant to Rule 41(b), and local rule of court, authorized to dismiss action with prejudice.

STATUTES INVOLVED

"RULE 41. DISMISSAL OF ACTIONS

"(a) VOLUNTARY DISMISSAL: EFFECT THEREOF

"(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. As amended Dec. 27, 1946, effective March 19, 1948.

"(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

"(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any

claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provded for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. As amended Dec. 27, 1946, effective March 19, 1948."

* * *

STATEMENT

On April 4, 1958, petitioner filed this action in the Oregon district court for breach of contract and for reformation of contract. It is a diversity case under 28 U.S.C.A. Section 1332 and 28 U.S.C.A. Section 1391(a).

On April 28, 1958, respondents filed their answer. No affirmative relief or counterclaims were sought.

On May 19, 1958, without assigning any reasons therefor, petitioner orally moved the district court for a voluntary dismissal. The motion was resisted by respondents and it was denied (Tr. 42). The case was thereupon regularly set for pre-trial conference to be held July 21, 1958.

On May 23, 1958, petitioner filed a motion for reconsideration of its previous motion for a voluntary dismissal. The reasons for the motion appear in its Statement of the Case, page 6.

On June 16, 1958, the motion was argued to the district court and was again denied.

Thereafter petitioner filed a motion in the court of appeals, Ninth Circuit, for leave to apply for a Writ of Mandamus against the District Judge (Tr. 53). On July 16, 1958, the court of appeals denied the motion, concluding that the district court acted within the limits of discretion in denying the motion for a voluntary dismissal (Tr. 53).

Thereafter, and on July 17, 1958, petitioner filed in the district court a Notice of Election (Tr. 18) that it declines to proceed further with its case.

On July 21, 1958, the district court for the second time, set the case for pre-trial conference, to be held August 4, 1958.

Despite petitioner's due notice of the date for pre-trial conference, it wilfully made no appearance before the court, although respondents were present and prepared to proceed therewith. Thereupon, on motion of respondent, and with prior notice to petitioner, the district court entered an order dismissing the action with prejudice (Tr. 23-26).

The order of dismissal was affirmed by the court of appeals (Tr. 49-57). A petition for rehearing was denied (Tr. 59).

ARGUMENT

Here the issue is whether a litigant is entitled to reserve an arbitrary privilege as to whether it will or will not abide by orders of a trial court to prosecute a case with due diligence.

Rule 41(b), Federal Rules of Civil Procedure, are plain:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against him * * * "

Whether the district court exercised its discretion properly in dismissing petitioner's action with prejudice is not the real gravaman of this case. Petitioner wilfully assumed authority to defy the orders of the court to prepare for pretrial conferences. The Rules of Civil Procedure were adopted to expedite the business of a court and petitioner is duty bound to adhere to all these rules. Supplementing Rule 41(b) is the local rule of the district court:

> "Rule 17. All actions must be prosecuted with due diligence, and any action not so prosecuted may be dismissed for want of prosecution."

Countenancing to a litigant its unilateral action of which one of the Rules of Civil Procedure it will condescend to observe would be tantamount to approval for the gradual whittling away of all rules. "Where law ends, tyranny begins."

A non-compliance with the Rules of Civil Procedure authorizes a dismissal of a cause. *Collins v. Wayland*,

et al, 139 F.2d 677 (9th); *Mooney v. Central Motor Lines, Inc.*, 222 F.2d 569 (6th); *Hubbard v. The B. & O. R. R. Co.*, 249 F.2d 885 (6th); *Wisdom v. Texas Co.*, 27 F. Supp. 992.

Notwithstanding orders of the district court, and in complete defiance thereof, and while this action was pending, petitioner arbitrarily ignored the court, and proceeded to file a second action against respondents in the United States District Court for the Eastern District of Washington. In so doing, petitioner defiantly assumed a prerogative concerning venue of an action, which by law, belongs to the court. And this prerogative of a court is the way it ought to be if business of the court is to be conducted efficiently and with dispatch.

Here the court of appeals denied mandamus, finding no abuse of discretion by the district court. Subsequently a different panel of the same court reviewed the action of the district court, and again found that the district court had not abused its discretion.

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, cited by petitioner is not apposite. There this court found that in the absence of a motion in the trial court for a judgment NOV the appellate court was without power to direct the trial court to enter judgment contrary to the one it had permitted to stand. That case involved a trial on the merits. Neither litigant defied the court in their respective adherence to its rules or the Rules of Federal Procedure. Defendant there simply erred in failing to take cognizance of Rule 50(b), requiring the filing a motion for judgment NOV within

ten days. Thus it lost the benefit of the rule in so far as such a motion would have vitality. The quotation of petitioner from that case was argumentatory and is obiter dictum.

Rule 41(2), Rules of Civil Procedure manifestly vest in the trial court some reasonable discretion on a motion for a voluntary dismissal, and in the exercise of this discretion, the court considers the relative positions of the parties and determines whether prejudice will develop therefrom. That prejudice will result to respondents is found (Tr. 36) in the fact that all their records respecting this action and their witnesses are located in Oregon; also that respondents had made preparations for and were ready to go to trial.

As pointed out in *Ockert v. Union Barge Line Corp.*, 190 F.2d 303 (3rd):

> ". . . It is likewise an increasingly burdensome matter to one's opponent if a case has been prepared, trial date set and the party and his witnesses on hand and ready for trial . . ."

It is also well established law that, the allowance of a motion to dismiss under Rule 41(2) is not a matter of right, and as the lower court concluded, but is discretionary with the district court *both* as to whether a dismissal shall be allowed as well as to the terms and conditions to be imposed if allowed. *Adney v. Mississippi Lime Company of Missouri*, 241 F.2d 43 (7th); *Grivas v. Parmelee Transportation Co.*, 207 F.2d 334, Cert. denied 347 U.S. 913, 74 S. Ct. 477, 97 L. Ed. 1069.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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